IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 105 OF 2003

Miss Maria Manuela Piedade
Bernadete Tereza Quiteria Moniz,
alias Maria Manuela Moniz,
of major age,
Residing at House No. 369,
Borda, Margao, Goa. ..... Appellant
(Original Plaintiff)

V e r s u s

Mr. Vassant Shet Shirodkar,
Son of late Narayan Shet Shirodkar,
Aged about 62 years,
Retired private employee,
Residing at House No. 369,
St. Joaquim Road,
Borda, Margao, Goa.
* Registered Address.

..... Respondent
(Original Defendant)

Mr. S. D. Lotlikar, Senior Advocate with Ms. Shreya Naik, Advocate for the Appellant.

Mr. S. Usgaonkar, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 22nd June, 2006.

J U D G M E N T

This is plaintiff's second appeal arising from the suit for eviction filed by the plaintiff against the defendant which came to be decreed by the trial Court but which came to be dismissed by FAC (First Appellate Court) by Judgment dated 09.09.2003.

2. At present, there is no dispute that the defendant entered into an agreement initially with the mother of the plaintiff dated 01.06.1981, under which, the defendant came to occupy six rooms of their house on payment of monthly compensation of Rs.200/-. One of the conditions of the said agreement was that the agreement was for a period of eleven months but renewable upon execution of a new agreement, if both the parties agreed. After the death of plaintiff's mother, the defendant executed an agreement dated 01.03.1984 with the plaintiff. Under this agreement, the defendant was allowed to occupy three rooms, other than those which were allowed to be occupied under the agreement dated 01.06.1981. The compensation payable remained the same. Thereafter, the defendant executed with the plaintiff agreements dated 01.02.1985, 01.11.1988, 01.10.1989 and lastly agreement dated 01.09.1990. All the earlier

agreements (except agreement dated 01.09.1990), stipulated that the defendant as occupant would not be entitled to allow any third party to occupy the said premises or sub-let the same to anyone. All the said agreements also stipulated that the agreement would be for a period of eleven months, and as already stated, renewable if both parties agreed by executing a new contract. None of the said agreements referred to the plaintiff or the defendant as licensor or licensee or for that matter as lessor and lessee but they were referred to as owner and occupant, respectively. It is only the last agreement dated 01.09.1990, that provided that premises i.e. three rooms and a common W.C. were being permitted to be used for a period not exceeding eleven months only and that it was on the basis of leave and license. It also provided that the agreement would never be construed as any tenancy agreement or lease nor otherwise creating any other right and interest in the said premises in favour of the occupant which was not at all the intention of the parties but on the contrary was merely a temporary agreement or arrangement simply to allow the occupant to use and occupy a portion of the said house i.e. the said premises for residential purpose under the control and supervision of the owner for which purpose, the owner had retained the major part of the house. (Clause 1 of the said Agreement). It also provided that in default of payment of monthly

compensation or the occupant violating any terms and conditions of the agreement, the owner would be entitled to and would always have the power to revoke the license which was granted at her absolute discretion and re-occupy the premises without subjecting herself to any liability on that count.

3. Although the defendant denied the execution of the agreements except the agreement dated 01.06.1981 with the mother of the plaintiff, both the Courts below have come to the conclusion that the defendant did execute all the aforesaid agreements with the plaintiff. The learned trial Court after considering the evidence of the plaintiff and her witnesses, coupled with various agreements produced by the plaintiff, came to the conclusion that the plaintiff had adequately established that the said agreements were leave and license agreements and that the intention of the parties was merely to create leave and license in favour of the defendant and in that light, proceeded to decree the suit. However, the learned FAC held that what was of prime importance to determine the relationship between the parties was the first agreement dated 01.06.1981 since that agreement was the foundation of the relationship between the plaintiff and the defendant and it was the most crucial agreement to determine the status

of the defendant i.e. whether the defendant was a licensee or a tenant. The learned FAC after referring to a number of Judgments of the Apex Court came further to the conclusion that after the agreement dated 01.06.1981 (between the mother of the plaintiff and the defendant), there were no further agreements and at the end of eleven months i.e. after 30.04.1982, the defendant had continued to be in possession and enjoyment of the suit premises without any agreement and, therefore, he could be considered to have become the statutory tenant. The learned FAC further came to the conclusion that for the first time the relationship between the parties was sought to be changed by agreement dated 01.09.1990 but since the relationship of the defendant was already that of a statutory tenant, the learned FAC proceeded to ignore the said agreement dated 01.09.1990. It appears that both the Courts below and particularly the learned FAC have failed to take note of the fact that a new relationship was created between the plaintiff and the defendant in respect of all together new premises on payment of monthly compensation of Rs.200/- by virtue of the agreement dated 01.03.1984, and if at all any agreement was to be considered as most crucial, was the agreement dated 01.03.1984 between the plaintiff and the defendant and not the earlier agreement between the plaintiff's mother and the defendant which was all together in respect of different premises, may

be of the same house, which was belonging to the mother of the plaintiff and presumably after her death, to the plaintiff. The view expressed by the learned FAC is sought to be canvassed as the correct view before this Court by Shri Usgaonkar, the learned Senior Counsel on behalf of the defendant. As per Shri Usgaonkar, the learned FAC has considered all the agreements referred to herein above and, as rightly pointed out by FAC, has submitted that it is the first agreement which assumes significance and since the defendant by virtue of the first agreement had acquired protection under the G.D.D. (LRE) Control Act, 1968, the subsequent agreements entered into between the plaintiff and the defendant would not have any legal effect of effacing the status of a statutory tenant acquired by the defendant by virtue of the first agreement. Shri Usgaonkar has also referred to Clause 8 of the first agreement dated 01.06.1981, the clause prohibiting, sub-letting, etc. and has submitted that it is an indication that the agreement was a tenancy agreement and so also to similar clauses in the other agreements to the same effect.

On the other hand, Shri Lotlikar, the learned Senior Counsel has focused the case of the plaintiff on the last agreement dated 01.09.1990 between the plaintiff and the defendant and has submitted that the FAC did

not at all look into this last agreement and it is the last agreement which had to be looked into because the parties were certainly entitled to modify the terms of any agreement previously entered into by them. Shri Lotlikar submits that there is no prohibition in law that even in a case where the person was a lessee he could not change his status into a licensee under a written agreement and in that light the Clauses of the last agreement carry extra significance. As per Shri Lotlikar, the FAC could not have placed emphasis on the first agreement at all because the parties as well as the premises under the agreement dated 01.03.1984 were different. Without prejudice, Shri Lolikar has further submitted that even if the first agreement dated 01.06.1981 was to be considered, a reading of the said agreement as a whole would not indicate that it was an agreement of lease and its terms that the agreement was not renewable automatically; permission was granted to licensee alone and no other person; the stipulation that the defendant had no right to any other portion and the admitted position that the water and electricity metres were in common and bills had to be paid with due understanding of the plaintiff's mother as per metre readings are indicative of the fact that the said agreement dated 01.06.1981 could not be considered as a lease agreement.

4. On behalf of both the parties, reference has been made to a number of decided cases. For example, Shri Lotlikar, on behalf of the plaintiff, has placed reliance on the cases reported in ***AIR 1999 S.C. 2607, AIR 1996 S.C. 3288, 2001 B.C.R. 440, 2006 ALL. M.R. 196*** and ***AIR 2002 Bombay 471***. On the other hand, on behalf of the defendant, reliance has been placed on cases reported in ***1995 SUPP (1) S.C.C. 306, AIR 1989 S.C. 1816,*** and ***1971 (1) S.C.C. 276.***

5. I have already referred to the fact that the plaintiff and the defendant or for that matter, the plaintiff's mother and the defendant earlier did not refer to the expressions such as lessor and lessee or licensor and licensee except in the last agreement between the plaintiff and the defendant. It is well settled now that for ascertaining whether a document creates a licence or a lease, what is to be seen is the substance of the document and it is the substance which must be preferred to the form and the real and dominant test being the intention of the parties whether the parties intended to create a lease or a license. A lease is a transfer of a right to enjoy the premises whereas a license is a privilege to do something on the premises which otherwise would have been unlawful. The transaction is a lease if it grants an interest in the land and it is a license if it gives a

personal privilege with no interest in the land. The Apex Court in the case of ***Associated Hotels of India Ltd. v. R. N. Kapoor (AIR 1959 S.C. 1262),*** speaking through three learned Judges, has stated that even if the document uses a phraseology appropriate to a licence, it is a substance of the agreement that matters and not the form, for otherwise clever drafting can camouflage the real intention of the parties and further stated that there is a marked distinction between a lease and a license, a lease being a transfer of a right to enjoy such property made for a certain time in consideration of a rent paid or promised and the lessee is entitled to put in possession of the property and a licence gives only a right to use a property in a particular way or under certain terms while it remains in possession and control of the owner thereof and the licensee is permitted to make use of the premises but for the permission, his occupation would be unlawful and it does not create in his favour any interest in the property and there is a clear distinction between both the two concepts though the dividing line between the two at times is very thin and even blurred and at times the exclusive possession is not decisive. The Apex Court in the case of ***Sohan Lal Naraindas v. Laxmidas (1971 (1) S.C.C. 276),*** again speaking through three learned Judges, has stated that intention of the parties to an instrument must be gathered from the terms of the agreement examined in

the light of the surrounding circumstances. The description given by the parties may be the evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property, the subject-matter of the agreement. If it is in fact intended to create an interest in the property, it is a lease, if it does not, it is a licence. In determining whether the agreement creates a lease or a licence, the test of exclusive possession, though not decisive, is of significance. The Apex Court in the case of ***Delta International Ltd. v. Shyam Sundar Ganeriwalla & Anr. ((1999) 4 S.C.C. 545)***, again reiterated that to find out whether the document creates a lease or a licence, the real test is :

> "1. To find out whether the document creates a lease or a licence, the real test is to find out the intention, keeping in mind in cases where exclusive possession is given, the line between a lease and a licence is very thin.
>
> 2. The intention of the parties is to be gathered from the document itself. Mainly the intention is

to be gathered from the meaning and the words used in the document except where it is alleged and proved that the document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

3. In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be the most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

4. If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole.

5. Prima facie, in the absence of a sufficient title or interest to carve out or to create a similar

tenancy by the sitting tenant in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or sub-tenancy.

6. Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act, 1882, inter alia, provides that leases of immovable property may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well-laid principles for construction of contractual terms i.e. for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment, one which is lawful should be preferred and the construction may be put on the instrument perfectly consistent with his doing only

what he had a right to do."

In ***Peter Alex D' Souza v. Prithi Paul Singh (AIR 2002 Bombay 471)***, a Division Bench of this Court noted that in the case of a licence, there is something less than a right to enjoy the property in the licensee, it cannot be exercised by servants and agents, is terminable and a transferee of the property is not as such bound by the licence. On the other hand, in the case of a lease, there is a transfer of a right to enjoy the property or in other words, the lessee is entitled to enjoy the property. One has to gather and find out the true intention of the parties as to whether the document creates a lease or license, the dominant intention of the parties is to be gathered from the terms of the document irrespective of the labels that the parties may put upon it and exclusive possession by itself would not militate against the concept of a licence, if the circumstances negate any intention to create a tenancy.

6. In my opinion, the learned FAC fell in error by placing unwarranted emphasis on the first agreement dated 01.06.1981, executed between the plaintiff's mother and the defendant as the most crucial agreement to determine the status of the parties. There is no doubt that the

said agreement dated 01.06.1981, was not renewed at the end of its term by the mother of the plaintiff and the defendant but that certainly would not have made the defendant a tenant of the plaintiff's mother. The said agreement dated 01.06.1981 did provide that the agreement would be renewable on executing a new contract if both parties agreed and even assuming that the defendant had continued under the said first agreement dated 01.06.1981, that ipso facto, would not make the defendant as a tenant unless the same was intended to create a tenancy. The said agreement came to an end when the defendant chose to enter into another agreement with the plaintiff and this time in respect of different premises then those occupied by him under the first agreement with the mother of the plaintiff, and, if at all another agreement had to be looked into while interpreting the terms of the last agreement entered into between the plaintiff and the defendant, it is the agreement dated 01.03.1984, between the plaintiff and the defendant. The fact that the plaintiff's mother agreed with the defendant under the first agreement and later the plaintiff with the defendant under the other agreements that the defendant would not be entitled to allow any third party to occupy the premises or sub-let the same by itself could be no indication that the status of the defendant could be accepted to be that of a tenant because only a tenant could have sub-let the

premises. On the other hand, as explained by the Apex Court, in a later decision in the case of ***Swarn Singh v. Madan Singh (1995 Supp(1) S.C.C. 306)***, such a clause is nothing more than an affirmation of the requirement that the licensee must use the property. In other words, it is an expression of the intention of the parties that the occupation of the defendant was personal to him and he was not allowed to allow any other party to occupy the premises or to sub-let the same. That clause in all the agreements would not make the said agreements one of lease. The very fact that the defendant was given initially six rooms and later by the plaintiff three rooms other than the six rooms given by the mother of the plaintiff to the defendant, to be used along with a common W.C. and with a common electricity and water metre bills which were to be paid with the understanding with the plaintiff's mother and later with the plaintiff would militate against the assertion of the defendant that exclusive possession was given to the defendant. The fact that every agreement stipulated that the same would be renewable at the end of it by executing a new agreement if both the parties agreed, tended to show that what was being given was a personal privilege and not interest in land. In my view, the plaintiff and the defendant have entered into a fresh agreement dated 01.03.1984 and thereafter having modified their relationship by last agreement dated

01.09.1990, it is this last agreement which was executed between the plaintiff and the defendant which governed their relationship and the terms of which do not at all indicate that the parties intend to create a lease. In this last agreement dated 01.09.1990, they clearly spelt out their relationship that the occupation by the defendant was on the basis of leave and licence keeping a right to the plaintiff to revoke the same at her absolute discretion and the same was indeed revoked by the plaintiff by letter dated 27.04.1991 when the plaintiff found that the defendant had become irregular in the payment of the compensation. This agreement when read as a whole is clear that the parties intended to remain out of provisions of the Rent Act. The defendant tried to wriggle out from the last agreement and so also with the agreements with the plaintiffs by stating that they were not executed by him but both the Courts below have rightly come to the conclusion that the defendant had executed the same. All the agreements were written down in English language and were signed in Roman script and both the parties appear to have been literate and it was not the case of the defendant at any time that the agreement dated 01.09.1990, was executed as a camouflage to evade the rigors of the Rent Act or it was executed as a sham document for achieving some other purpose. As stated by the Apex Court in the case of ***Delta International***

Ltd., (Supra), in this set of circumstances, the intention of the parties is to be gathered from the express words of various terms provided by them in the Deed, and as already stated, the last agreement dated 01.09.1990 clearly provides that the agreement would not be construed as a tenancy or lease agreement creating any right or interest in favour of the defendant. On the contrary, it shows that the premises were being given to the defendant on the basis of leave and licence only, the right to revoke being retained by the plaintiff. As already stated, in fact, the first agreement dated 01.06.1981 with the plaintiff's mother and the defendant had to be ignored and if any agreement was to be looked into besides the last agreement dated 01.09.1990, it was the second agreement dated 01.03.1984, between the plaintiff and the defendant, by which a new relationship was created between the plaintiff and the defendant in respect of the premises which were not covered by the first agreement. This agreement stipulated that it would be renewed by executing a new contract and ultimately the last agreement between the plaintiff and the defendant was dated 01.09.1990, the terms of which read as whole, do not indicate at all that the parties intended to create a lease in favour of the plaintiff but, on the contrary, the defendant more specifically agreed and accepted his status as a licensee. The plaintiff having found that the defendant had

breached its terms, put an end to the same. In my view, it is the conclusion arrived at by the learned trial Court that the relationship between the plaintiff and the defendant was not that of lessor or lessee, which has got to be accepted. In the light of that, both the substantial questions of law framed on 05.03.2004, have got to be answered in the affirmative and in favour of the plaintiff. As a result, the findings of the FAC are required to be disturbed. Consequently, the suit of the plaintiff is decreed in terms of prayer (a) since no grievance is made on behalf of both the parties to the findings given by the FAC as regards prayer (b).

7. Appeal allowed on the above terms, with costs.

Shri Usgaonkar, the learned Senior Counsel on behalf of the respondent seeks stay of the judgment so as to enable the respondent to file an appeal as according to him the Supreme Court is closed for vacations at present. Mr. M. D' Souza, the learned Counsel on behalf of the appellant objects for the grant of stay. Considering the totality of facts, stay is granted. The operation of this Judgment shall be stayed for a period of eight weeks.

N. A. BRITTO, J.

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